TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 177

WILLIAM D. STEIN, FRANK G. HALL, AND GERDA STEIN, PARTNERS, DOING BUSINESS UNDER THE FIRM NAME OF STEIN, HALL & COMPANY, ETC., PLAINTIFFS IN ERROR,

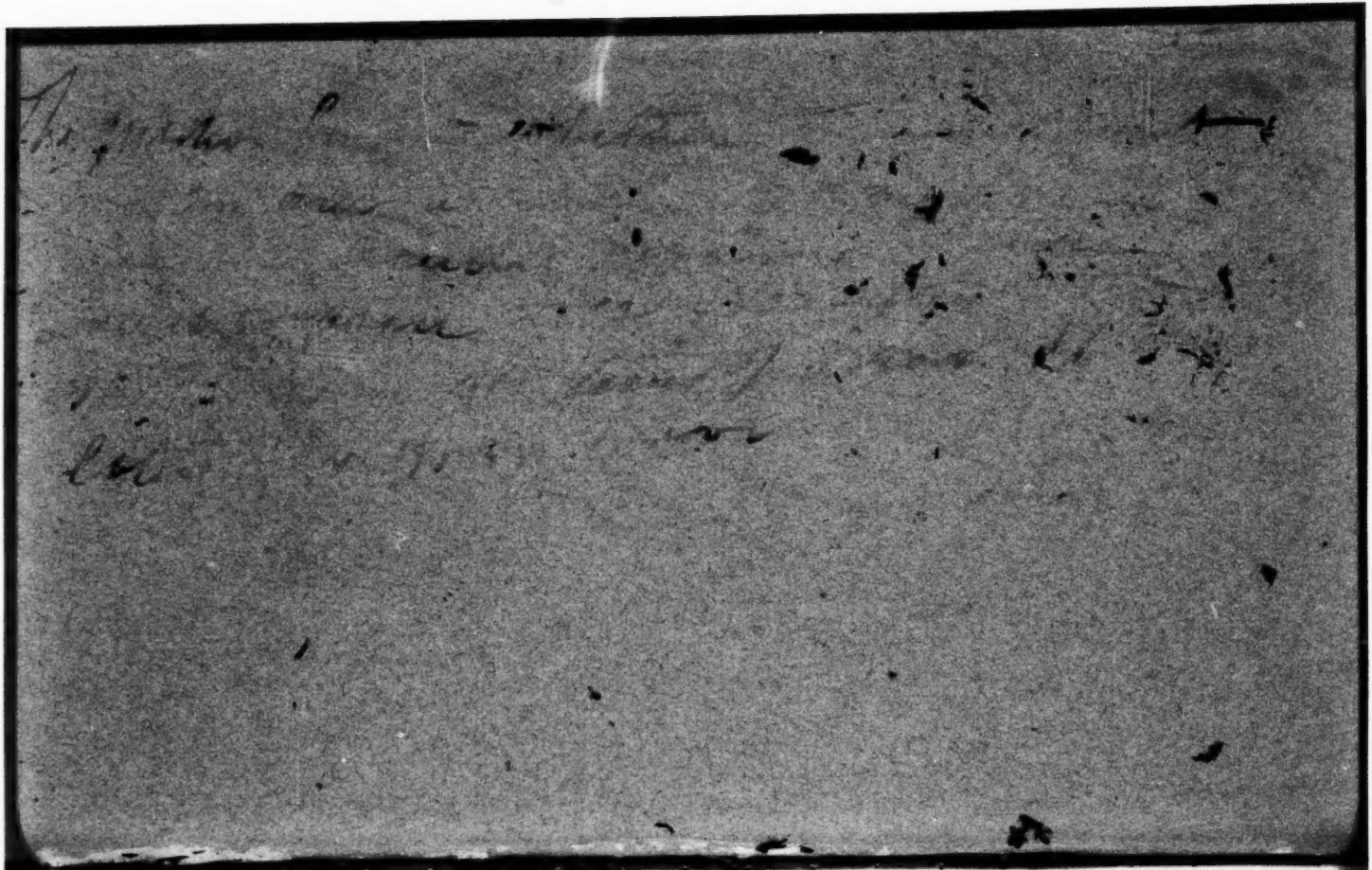
vs.

TIP-TOP BAKING COMPANY

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY

FILED SEPTEMBER 24, 1924

(30,881)



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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 12, 1924

[fol. 1] [CAPTION—Omitted]

[fol. 1a] **IN UNITED STATES DISTRICT COURT**

WRIT OF ERROR

The President of the United States to the Honorable the Judge of the District Court of the United States for the Western District of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you or some of you, between William D. Stein, Frank G. Hall and Gerda Stein, partners doing business under the firm name of Stein, Hall & Company, suing for the use and benefit of Stein, Hall Manufacturing Co., Plaintiffs, and Tip-Top Baking Company, a corporation, Defendant, a manifest error hath happened, to the great damage of the said William D. Stein, Frank G. Hall and Gerda Stein, partners doing business under the firm name of Stein, Hall & Company, suing for the use and benefit of Stein, Hall Manufacturing Company, a corporation, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this writ, so that you have the same at Washington, D. C., in said Circuit, on the *27th day of September, next, in the Supreme Court of the United States, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 29th day of August, in the year of our lord one thousand nine hundred and twenty-three, and of the Independence of the United States of America the one hundred and forty-eighth.

A. G. Ronald, Clerk of the District Court of the United States, Western District of Kentucky.

Allowed by Walter Evans, Judge.

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*Not exceeding 30 days from the day of signing the citation.

[fol. 2] IN U. S. DISTRICT COURT

PETITION—Filed November 14, 1919

Plaintiffs, William D. Stein, Frank G. Hall and Gerda Stein, say that prior to January 1, 1919, they were continuously for many years doing business as partners, under the firm name and style of *of* Stein, Hall & Company, their business being the purchase, manufacture and sale of food stuffs in the State of Illinois, and in interstate commerce in Kentucky and other States. The chief place of business of said partnership during all of the said period was in the City of Chicago, State of Illinois, and each of said plaintiffs during said period and continuously since January 1, 1919, up to and including the present time was and is a citizen and resident of the State of illinois, and neither has been at any time a citizen or resident of the State of Kentucky.

Plaintiff, Stein, Hall Manufacturing Company, is now and has continuously been since January 1, 1919, a corporation duly created, organized and existing under and by virtue of the laws of the State of Delaware, with its chief place of business in the city of Chicago, State of Illinois, and it never has been a citizen or resident of the State of Kentucky. The business of said plaintiff is that of the purchase, manufacture and sale of food stuffs, and it does such business in the State of Illinois, and in interstate commerce in Kentucky, and in other states, and it has power to sue and be sued, contract and be contracted with, and to conduct its said business under its corporate name which is as before stated.

Plaintiffs say that defendant, Tip-Top Baking Company, is now, and has continuously been for many years a corporation duly created, [fol. 3] organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, under its corporate name, which is as above stated, and to conduct the business for which it was incorporated, that is the purchase of food stuffs to be manufactured into bread and other edibles. The principal office and place of business of said defendant is in the city of Louisville, County of Jefferson and State of Kentucky, and it has been continuously since its corporation, and is now, a citizen and resident of the State of Kentucky.

Plaintiffs further state that on January 1, 1919, plaintiff, Stein, Hall & Company, for a good and valuable consideration, assigned and transferred to plaintiff, Stein, Hall Manufacturing Company, all the assets, claims, liabilities and property of whatever nature or description which was owned by said Stein, Hall & Company, on said date, and plaintiff, Stein, Hall Manufacturing Company, took over all of said claims and assets and thereby became the owner of the claim hereinafter set out, and became, was and is the successor of Stein, Hall & Company.

Plaintiffs say that on or about October 9, 1918, plaintiff, Stein, Hall & Company, at the special instance and request of defendant, Tip-Top Baking Company, sold to said defendant one (1) maximum

car 80,000 to 100,000 lbs. Badex 125 lbs. bags at 7¼ net lb. F. O. B. Chicago, Illinois. Shipment of same to be made to defendant in Louisville, Kentucky, within sixty (60) days after said purchase, or about December 9, 1918, and said Badex was food stuff, and defendant agreed and promised to pay for daid Badex upon the delivery of same to a common carrier in Chicago, Illinois, free on board its cars to be transported by said common carrier to defendant in Louisville, Kentucky.

Plaintiffs further say that plaintiff, Stein, Hall & Company, in compliance with its contract of said purchase and sale, did, on or about December 9, 1918, deliver to a common carrier of freight from Chicago, Illinois, to Louisville, Kentucky, free on board a car of said common carrier, 80,000 lbs. of said Badex in one hundred and [fol. 4] twenty-five (125 lb.) pound sacks, which shipment was consigned to defendant.

Plaintiffs further say that said Badex as aforesaid, was a compliance with its contract with defendant, and a tender of said Badex to said defendant.

Plaintiffs further say that said Badex was in due course transported by said common carrier to Louisville, Kentucky, and was there, on or about, to wit, December 12, 1918, tendered to said defendant, but that said defendant refused to accept said delivery of same, and refused to accept the bill of lading for said Badex, and to pay the purchase price of same, to wit, the sum of Fifty-eight Hundred Dollars ($5,800.00), and plaintiffs were compelled to, and did take possession of said Badex as their own.

Plaintiffs say that said Badex, on or about December 12, 1918, and for some time subsequent thereto at the place of delivery of said Badex under said contract, was of no value upon the open market f. o. b. Chicago, or elsewhere, and there was no fair or reasonable or market or any price for same.

Plaintiffs say that by reason of the aforesaid conduct of defendant, it violated its contract with plaintiffs, and they were thereby damaged in the sum of Fifty-Eight Hundred Dollars ($5,800.00) with interest from December 12, 1918, until paid, at the rate of six per cent per annum by reason of violation by defendant of said above stated contract.

Wherefore, plaintiffs pray judgment in damages against defendant in the sum of Fifty-eight Hundred Dollars ($5,800.00), with interest from December 12, 1918, until paid, for their costs in this action expended and for all proper relief.

Stein, Mayer & Davir, Richard Priest Dietzman, Charles Carroll, Attorneys for Plaintiffs.

[fol. 5] Jurat showing the foregoing was duly sworn to by William D. Stein omitted in printing.

[fol. 6] IN UNITED STATES DISTRICT COURT

SUMMONS AND SHERIFF'S RETURN—Filed November 21, 1919

The President of the United States of America to the Marshal of the Western District of Kentucky, Greeting:

You are commanded to summon Tip-Top Baking Company, a corporation, to answer on the first day of the next March term of the District Court of the United States, for the Western District of Kentucky, to be held at the City of Louisville, a petition filed against it in said Court by William D. Stein, Frank G. Hall, and Gerda Stein, partners doing business under firm name of Stein, Hall & Company etc. and Stein, Hall Manufacturing Company, a corporation, and warns it that upon its failure to answer, the petition will be taken for confessed or it will be proceeded against for contempt, and you will make due return of this summons on the first day of the next term of said Court.

Witness the Honorable Walter Evans, Judge of the District Court of the United States at Louisville, in the said District, this 14th day of November, in the year of our Lord 1919, and of our Independence the 144th.

A. G. Ronald, C. D. C., W. K. D., by M. E. Hollihan, Detpuy.

Receiver the within Summons and copy at Louisville, Ky., Nove. 17th 1919 Executed same in Louisville, Nov. 21st 1919 on the Tip-Top Baking Company a corporation, by deliverin- a true copy hereof to T. M. Murphy Vice Pres. of said company.

This, Nove. 21, 1919.

E. H. James, U. S. Marshal, by Ellis Workman, D. M.

Fees, $2.00.

Exp., .10.

[fol. 7] IN UNITED STATES DISTRICT COURT

AMENDED PETITION—Filed February 24, 1920

Come the plaintiffs, William D. Stein, Frank G. Hall and Gerda Stein, partners doing business under the firm name of Stein, Hall & Company, suing for the use and benefit of Stein, Hall Manufacturing Company, a corporation, and Stein, Hall Manufacturing Company, a corporation, in the above styled action, and by leave of court amend their petition herein for the purpose of complying with request of defendant, that the contract between plaintiffs, Stein, Hall & Company, and defendant be more exactly stated than in petition. Plaintiffs withdraw from petition the following allegations:

"Plaintiffs say that on or about October 9, 1916, plaintiff, Stein, Hall and Company, at the special instance and request of defendant, Tip-Top Baking Company, sold to said defendant one (1) maximum car 80,000 to 100,000 Lbs. Badex 125 Lbs. Bags at 7¼ net Lbs. F. O. B. Chicago, Illinois. Shipment of same to be made to defend-

ant in Louisville, Kentucky, within sixty (60) days after said purchase, or about December 9, 1918, and said Badex was food stuff, and defendant agreed and promised to pay for said Badex upon the delivery of same to a common carrier in Chicago, Illinois, free on board its cars to be transported by said common carrier to defendant in Louisville, Kentucky.

Plaintiffs further say that plaintiff, Stein, Hall & Company in compliance with its contract of said purchase and sale, did, on or about December 9, 1918, deliver to a common carrier of freight from Chicago, Illinois, to Louisville, Kentucky, free on board a car of said common carrier, 80,000 Lbs. of said Badex in one hundred and twenty five (125 Lbs.) pound sacks, which shipment was consigned to defendant.

[fol. 8] Plaintiffs further say that said Badex as aforesaid, was a compliance with its contract with defendant, and a tender of said Badex to said defendant.

Plaintiffs further say that said Badex was in due course transported by said common carrier to Louisville, Kentucky, and was there, on or about to-wit, December 12, 1918, tendered to said defendant, but that said defendant refused to accept delivery of same, and refused to accept the bill of lading for said Badex and to pay the purchase price of same, to-wit, the sum of Fifty-eight Hundred (5,800.-00) Dollars, and plaintiffs were compelled to, and did take possession of said Badex as their own."

Plaintiffs, in lieu thereof, state that on the 9th of October, 1918, the agent of plaintiff, Stein, Hall & Company, in Louisville, Kentucky, at the special instance and request of defendant, Tip-Top Baking Company, and subject to the confirmation of plaintiff, Stein, Hall & Company, sold to defendant one maximum order of 80,000 Lbs. to 100,000 Lbs. Badex 125 Lbs. Bags at 7¼ net Lbs. F. O. B. Chicago, Illinois, to be shipped to Louisville, Kentucky. Said shipment to be made within sixty days, or about December 9th, 1918. Sight draft for purchase price to be attached to bill of lading and sent to Louisville, Kentucky, to be delivered to defendant. Plaintiff, Stein, Hall & Company, confirmed said sale on the 10th day of October, 1918 and defendant was immediately notified thereof by said plaintiff. Said Badex was food stuff and defendant agreed and promised to pay for said Badex upon the presentation of said sight draft against said bill of lading when same was presented to it.

Plaintiffs state that plaintiff, Stein, Hall & Company, in compliance with its said contract of purchase and sale, did, on December 9, 1918, deliver at Chicago, Illinois, to the Cleveland Cincinnati, Chi-[fol. 9] cago and St. Louis Railroad, a common carrier of freight, from Chicago, Illinois, to Louisville, Kentucky, free on board a car of said common carrier, 80,000 Lbs. of said Badex in 125 pound sacks, which said shipment was consigned "to the order of Stein, Hall & Company, at Louisville, Kentucky, notify Tip-Top Baking Company," and said bill of lading, in accordance with the terms of said contract hereinbefore set out, was attached to a sight draft drawn by said plaintiff, Stein, Hall & Company, upon said defendant and sent through the banks to the National Bank of Kentucky in Louis-

ville, Kentucky, in the usual course, and an invoice of said shipment so made was immediately mailed to said defendant, Tip-Top Baking Company, and was received by it on or before December 12, 1918, and said draft with said bill of lading attached, arrived in Louisville, Kentucky, on or about December 12, 1918, and said defendant, Tip-Top Baking Company, was notified that said draft and bill were at the said National Bank of Kentucky, and that on acceptance and payment of said draft by said defendant, said bill of lading would be immediately turned over to said defendant, Tip-Top Baking Company.

Plaintiffs further state that said Badex was in due course transported by said common carrier to Louisville, Kentucky, and was there, on or about December 12, 1918, and had said defendant accepted and paid said draft, said bill of lading would have been turned over to it, and it would have obtained said Badex from said common carrier on or about December 12, 1918.

Plaintiffs say that on December 12, 1918, defendant, Tip-Top Baking Company, notified plaintiff, Stein, Hall & Company, that it would not accept said Badex, and would not pay for same, or take charge of same, and notified said Stein, Hall & Company to take charge of said Badex, and returned to Stein, Hall & Company the [fol. 10] invoice of said shipment which it had receiver, and thereby repudicated its said contract.

Plaintiffs say that said Badex was tendered to said defendant, and the bill of lading for said Badex was tendered to said defendant with sight draft attached, and payment of said draft demanded, but said defendant refused to accept said Badex, or said bill of lading, or pay the draft attached to said bill of lading, and plaintiff made every effort then and there to sell said Badex upon the open market and elsewhere, but was unable to do so, and it was compelled to and did take possession of said Badex as its own.

Plaintiffs further state that notwithstanding its undertaking, promise, agreement and contract as hereinbefore set out, said defendant refused to accept delivery of said Badex, and refused to accept or pay said draft, and refused to accept said bill of lading for said Badex and to pay the purchase price of same, to-wit, the sum of Fifty-eight Hundred Dollars ($5,800.00), and plaintiff, Stein, Hall & Company, was compelled to and did take possession of said Badex as its own.

Plaintiffs further state that said plaintiff, Stein, Hall & Company, by telephone, personal interview, solicitation and investigation, made every effort possible or known to them for a great number of months after said refusal to accept said Badex by said defendant, to sell same on the open market or to private purchasers or to any one who would take it, but were absolutely unable to get any bid whatever from any one for said Badex, and they aver that from the time of said refusal of said defendant to accept said delivery, as hereinfore set out, and for a long time subsequent thereto, at the place of delivery of said Badex under said contract, the same was of no value [fol. 11] upon the open market or elsewhere, or in Chicago, or elsewhere, and there was no fair or reasonable or market or any price for same.

Plaintiffs make all of the allegations of its original petition part and parcel of this amended petition, except as herein changed, the same as if copied at length herein.

Wherefore plaintiffs pray judgment in damages against the defendant in the sum of Fifty-eight Hundred Dollars ($5,800.00), with interest thereon from December 12, 1918, until paid, for their costs in this action expended, and for all proper relief.

Charles Carroll, Robert Priest Dietzman, Stein, Mayer & David, Attorneys for Plaintiffs.

[fol. 12] IN U. S. DISTRICT COURT

AMENDED PETITION—Filed March 17, 1920

The plaintiffs amend their petition herein to comply with the order of Court, and say that the carload of Badex in petition mentioned was retained by plaintiffs in its possession, and as its own, until the eighth day of November, 1919, when it was sold and delivered to Ruehlmann Flour Company, Cincinnati, Ohio, and since said time it has not been in the possession of plaintiffs.

Plaintiffs further state that on December 12, 1918, and for many months subsequent thereto, said Badex was of no value to these plaintiffs, and had no value of any kind that could be realized upon by the plaintiffs.

Charles Carroll, Richard Priest Dietzman, Attorneys for Plaintiffs.

[fol. 13] IN UNITED STATES DISTRICT COURT

MOTION AND ORDER TO MAKE PETITION MORE SPECIFIC—Filed March 18, 1920

Defendant moves the Court to require the plaintiffs to make their petition more specific in this:

By stating the price at which the plaintiffs sold the carload of Badex described in the petition.

Dodd & Dodd, George Du Relle, For Defendants.

[fol. 14] This case coming on to be heard on the motion of the defendant to require the plaintiffs to make their petition more specific in this:

By stating the price at which the plaintiffs sold the carload of Badex described in the petition.

And said motion having been heard, argued and submitted on the objections of the plaintiffs to said motion, and the court being now sufficiently advised, it is considered, ordered and adjudged by the court that said motion be and is hereby sustained, and said plaintiffs are required to make their said petition more specific by stating

the price at which the plaintiffs sold the carload of Badex described in the petition.

To all of which the plaintiffs except.

[fol. 15] IN UNITED STATES DISTRICT COURT

AMENDED PETITION—Filed May 1, 1920

Come the plaintiffs in the above styled action, and in obedience to the order of the Court, amend their original petition herein as heretofore amended, and for said amendment, state that the said Badex was sold by said plaintiffs, as set out in its amended petition herein, to the Ruehlmann Flour Company, of Cincinnati, Ohio, in November, 1919, for the sum of $1,521.95; that the plaintiffs paid to the Cleveland, Cincinnati, Chicago & St. Louis Railroad Company the sum of $103.62 as freight for transportation of said Badex from Chicago, Illinois, to Louisville, Kentucky, said transportation being that mentioned in the original petition herein; that the plaintiffs paid said railroad the sum of $18.54 demurrage on said Badex after the same had arrived in Louisville, Kentucky, as set out in the original petition herein and was refused by said defendant as set out in the original petition herein; that the plaintiff paid the carrier the sum of $1.64 for switching said Badex to Tabb's Warehouse in Louisville, Kentucky, after the same had been refused by the defendant, as set out in the original petition herein: that the plaintiffs paid said Tabb's Warehouse the sum of $281.60 as storage on said Badex, said Badex being stored in said warehouse from the time of its said refusal by the said defendant, as set out in the original petition herein, to November, 1919; that the plaintiffs paid the sum [fol. 16] of $20.00 for unloading said Badex from the carrier into said warehouse and for re-loading said Badex out of said warehouse into a carrier to be transported from Louisville, Kentucky, to Cincinnati, Ohio, there to be delivered to said Ruehlmann Flour Company, as set out in the amended petition herein; that the plaintiffs paid the carrier $78.05 as freight for transporting said Badex from said Tabb's storage Warehouse to said Cincinnati, Ohio, there to be delivered to said Ruehlmann Flour Company; that the plaintiffs paid one C. R. Bachman the sum of $115.00 as commissions for selling said Badex to said Ruehlmann Flour Company.

Plaintiffs further state that they do not elect to sell and have never elected to sell and did not in fact sell said Badex as agent or for the account of the defendants herein, but when said defendant refused to take said Badex, as set out in the original petition herein, said plaintiffs took possession of said Badex as their own and sold the same in November, 1918, as heretofore set out, as their own.

Wherefore, plaintiffs pray as in their original petition and for all proper relief.

Charles Carroll, Richard Priest Dietzman, Attorneys for Plaintiffs.

[fol. 17] IN UNITED STATES DISTRICT COURT

ANSWER—Filed July 2, 1920

The defendant, the Tip-Top Baking Company for answer to the petition of plaintiff as amended herein denies that on or about October 9, 1918 or at any other time the plaintiffs, Stein Hall & Company, at the special or any instance or request of said defendant, sold to said defendant one (1) maximum car 80,000 to 100,000 pounds Badex, 125 pound bags at 7¼ net pound, F. O. B. Chicago, Illinois, or that shipment of said Badex was to be made to said defendant in Louisville, Kentucky, within sixty days after said alleged purchase, or about December 9, 1918 or at any other time, or that said defendant agreed or promised to pay for said alleged Badex upon the delivery of said Badex to a common carrier in Chicago, Illinois, free on board the cars of such carrier to be transported by said common carrier to defendant in Louisville, Kentucky, or agreed or promised to pay any sum of money for said or any Badex at any time or date or under any conditions whatever.

Defendant denies that said plaintiffs shipped any Badex to defendant in compliance with any contract of purchase of any Badex by said defendant, or that there was any contract of purchase of any Badex by defendant from plaintiffs.

Defendant denies that said alleged Badex as aforesaid was a compliance with any contract of plaintiffs, or any of plaintiffs with defendant, or was a tender of said Badex to defendant, or that there [fol. 18] was any contract between plaintiffs, or any of them, and defendant concerning said alleged Badex or any Badex. Defendant says that it has no knowledge or information sufficient to form a belief whether said plaintiffs were compelled to or did take possession of said Badex as their own, and therefore denies same.

Defendant denies that said Badex, on or about December 12, 1918, or for some time subsequent to said date, was of no value upon the open market F. O. B. Chicago, or elsewhere, or that there was no fair or reasonable or market or any price for same. Defendant denies that by its alleged conduct or in any way it violated any contract with plaintiffs, and denies that plaintiffs were damaged in the sum of $5,800.00, with interest from December 12, 1918, or were damaged in any sum, or at all by reason of any violation by said defendant of said alleged contract or of any contract with plaintiffs.

Defendant, for answer to the allegations of plaintiffs in their amended petitions herein, denies that on the 9th of October, 1918, or at any other time, any agent of any of the plaintiffs, at the special or any instance or request of defendant or, subject to the confirmation of any of the plaintiffs or at all, sold to defendant one maximum order 80,000 pounds to 100,000 pounds Badex, 125 pound bags at 7¼ net pounds, F. O. B. Chicago, Illinois, to be shipped to Louisville, Kentucky, or sold to defendant any Badex; denies that it was agreed by said defendant that said alleged shipment was to be made within sixty days, or about December 9th, 1918, or at all, or that a sight draft for any purchase price of said alleged Badex was to be attached to bill of lading, or was to be sent to Louisville, Kentucky

to be delivered to defendant; denies that said plaintiffs, or any of [fol. 19] them, confirmed said sale on October 10, 1918, or that there was any such sale; denies that said Badex was food stuff within the meaning of the rulings of the Food Administration of the United States of America; denies that said defendant agreed to or promised to pay for said alleged Badex upon the presentation of a sight draft against said bill of lading when same was presented to defendant, or agreed or promised to pay for said alleged Badex at all; denies that the bill of lading alleged in said petition and amended petitions was attached to a sight draft upon said defendant in accordance with any contract by the defendant; denies that it repudicated any contract made by it with any of the plaintiffs, or that it had made any such contract.

Defendant says that it has nk knowledge or information sufficient to form a belief whether any of said plaintiffs made every or any effort to sell said alleged Badex in the open market or elsewhere, or was unable to do so, or was compelled to or did take possession of said alleged Badex as its own, and therefore denies said allegations.

Defendant denies that it had or made any such undertaking, promise, agreement or contract with the plaintiffs or any of them, as set out in the petition and amended petitions.

Defendant says that it has no knowledge or information sufficient to form a belief whether the plaintiffs or any of them by telephone, personal interview, solicitation, or investigation made -very or any effort possible known to plaintiffs to sell said alleged Badex on the open market, or to private purchasers, or to anyone, or were unable to get any bid for said alleged Badex, or whether at the date of defendant's refusal to accept said alleged Badex the same was of no value in the open market in said Louisville or elsewhere, or in Chi- [fol. 20] cago or elsewhere, or whether there was no fair or reasonable or market or any price for same, and defendant therefore denies said allegations.

Wherefore defendant prays to be hence dismissed with its costs and for all proper relief.

Allen P. Dodd, George Du Relle, Attorneys for Defendant.

Jurat showing the foregoing was duly sworn to by Thomas M. Murphy omitted in printing.

[fol. 21] In United States District Court

Motion to Dismiss—Filed May 18, 1923

The defendant, Tip Top Baking Company moves the Court to dismiss the petition of the plaintiffs as amended herein because the matter in controversy in this action does not exceed, exclusive of interest and costs, the sum or value of $3,000.00, and this Court has no jurisdiction over the matter in controversy in this action.

Allen P. Dodd, George Du Relle, Attorneys for Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

DEMURRER—Filed May 23, 1923

The defendant demurs to the petition of plaintiff as amended herein, because it shows that the amount in controversy herein, exclusive of interest and costs, does not exceed the sum or value of three thousand dollars, and this court has no jurisdiction of the matter in controversy in this action.

Allen P. Dodd, George Du Relle, Counsel for Defendant.

[fol. 23] IN UNITED STATES DISTRICT COURT

JUDGMENT—Entered May 23, 1923

This action coming on to be heard on the demurrer of the defendant to the plaintiffs' petition as amended was argued by counsel, and the court being advised, delivered its opinion in writing thereon, which is now filed, and which opinion also embraces the views of the court on the motion of the defendant to dismiss plaintiffs' petition as amended for want of jurisdiction in this court to hear and determine the questions involved in this action.

Pursuant to said opinion, and upon the grounds stated therein, it is now considered and adjudged by the court that the said demurrer should be and is now sustained, to which ruling of the court the plaintiffs except.

The plaintiffs are now given time to and including the 12th day of June, 1923, to further amend their petition herein. But the plaintiffs declined to plead further herein, and it is now ordered and adjudged by the court that this action should be and now is dismissed for want of jurisdiction in this court to hear and determine the same, to all of which the plaintiffs except. The court will not award costs to either party to the action.

[Fol. 24] IN UNITED STATES DISTRICT COURT

PETITION FOR WRIT OF ERROR—Filed June 29, 1923

And now come William D. Stein, Frank G. Hall, and Gerda Stein, Partners doing business under the firm name of Stein, Hall & Company, suing for the use and benefit of Stein Hall Manufacturing Company, a corporation, and Stein, Hall Manufacturing Company, a corporation, plaintiffs herein and say:

That on the 23rd day of May, 1923, the District Court entered a judgment herein in favor of the defendant Tip Top Baking Company, and against these plaintiffs in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to

the projudice of these plaintiffs, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, these plaintiffs pray that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Charles Carroll, W. F. Heffernan, Jr., Richard Priest Dietzman, Attornies for Plaintiffs.

[fol. 25] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 29, 1923

The plaintiffs in this action, in connection with their petition for writ of error, make the following assignment of errors, which they aver exist.

First. The Court erred in sustaining the demurrer of the defendant.

Second. The Court erred in dismissing plaintiffs' suit.

Third. The Court erred in adjudging that it was without jurisdiction or power to entertain the suit.

Wherefore, the plaintiffs pray that said judgment be reversed.

Charles Carroll, W. S. Heffernan, Jr., Richard Priest Dietzman.

[fol. 26] IN UNITES STATES DISTRICT COURT

ORDER ALLOWING PETITION FOR A WRIT OF ERROR—Filed July 19, 1923

The plaintiff having on June 29, 1923, filed herein its Assignment of Errors and also its Petition for a Writ of Error to the Supreme Court of the United States to review the judgment entered herein on the 23rd day of May, 1923, it is now ordered that said Petition for a Writ of Error be allowed upon the execution of a bond in the sum of Two Hundred Dollars, with good and sufficient surety to be approved by the Clerk of this Court.

[fol. 27] IN UNITED STATES DISTRICT COURT

BOND ON APPEAL FOR $200.00—Approved and filed July 23, 1923; omitted in printing

[fol. 28] IN UNITED STATES DISTRICT COURT

WAIVER OF CITATION—Filed July 23, 1923

Comes the defendant in the above styled action by counsel, and acknowledges receipt of copy of Præcipe for Transcript, and hereby waives the issuing and serving of the citation herein.

Geo. Du Relle, Allen P. Dodd, Attorneys for Defendant.

[fol. 29] IN UNITED STATES DISTRICT COURT

PRÆCIPE FOR TRANSCRIPT OF RECORD—Filed July 23, 1923

To the Clerk of the above-entitled Court:

You will please prepare transcript of the record in this cause, to be filed in the office of the Clerk of the United States Supreme Court under the writ of error heretofore allowed by said Court, and include in the said transcript the following pleadings, proceedings and papers on file, to-wit:

The petition filed November 14, 1919;
Summons;
The amended petition filed February 24, 1920;
The amended petition filed March 17, 1920;
The motion to make more specific filed March 18, 1920;
The order of March 25, 1920, requiring plaintiffs to make their petition more specific;
The amended petition filed May 1,1920;
The answer filed July 2, 1920;
The demurrer to the petition as amended, filed May 23, 1923;
The motion to dismiss filed May 18, 1923;
The Judgment entered May 23, 1923;
The petition for writ of error and supersedeas;
The assignment of errors;
[fol. 30] The order allowing writ of error and fixing supersedeas bond;
The supersedeas bond;
The Clerk's certificate to transcript of record;
The writ of error;
Præcipe for transcript of record;
Waiver of citation.

Said transcript to be prepared as required by the law and the rules of the United States Supreme Court.

Charles Carroll, Richard Priest Dietzman, W. S. Hefferan, Attorneys for Plaintiffs.

[fol. 31] IN UNITED STATES DISTRICT COURT

WRIT OF ERROR—Filed August 29, 1923; omitted; printed side page 1a ante

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[fol. 32] IN UNITED STATES DISTRICT COURT

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
Western Ditrict of Kentucky, ss:

I, A. G. Ronald, Clerk of the District Court of the United States for the Western District of Kentucky, do hereby certify that the foregoing transcript consisting of 31 pages, constitutes a full, true, and correct Transcript of the Record and proceedings had in said Court in the cause of William D. Stein, et al., Plaintiffs-in-Error, vs. Tip-Top Baking Company, a corporation, Defendant-in-Error, as the same remains of record and on file in my said office, and pursuant to the stipulation of counsel filed herein.

Witness my hand and the official seal of the said Court this 30th day of August, 1923.

A. G. Ronald, Clerk. [Seal District Court, the United States Western District of Kentucky.]

Endorsed on cover: File No. 29,881. Western Kentucky D. C. U. S. Term No. 177. William D. Stein, Frank G. Hall, and Gerda Stein, partners, doing business under the firm name of Stein, Hall & Company, etc., plaintiffs in error, vs. Tip-Top Baking Company. Filed September 24th, 1923. File No. 29,881.

Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 177.

WILLIAM D. STEIN, FRANK G. HALL and GERDA STEIN, partners doing business under the firm name of STEIN, HALL & COMPANY, and STEIN HALL MANUFACTURING COMPANY, - - - - - Plaintiffs-in-Error,

vs.

TIP TOP BAKING COMPANY, - Defendant-in-Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

CHARLES CARROLL,
SIGMUND W. DAVID,
W. S. HEFFERAN, JR.,
RICHARD PRIEST DIETZMAN,
Attorneys for Plaintiffs-in-Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 177.

WILLIAM D. STEIN, FRANK G. HALL AND GERDA STEIN, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF STEIN, HALL & COMPANY AND STEIN HALL MANUFACTURING COMPANY,
Plaintiffs-in-Error,

vs.

TIP TOP BAKING COMPANY, - *Defendant-in-Error.*

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.

STATEMENT OF FACTS.

The lower court held that the facts averred in the petition show plaintiffs' damages, exclusive of interest and costs, not to exceed $3,000.00, and that therefore the Federal Court had no jurisdiction. The sole question, therefore, before the court is whether the facts so averred show plaintiffs' damages to be greater than $3,000.00.

The petition alleges that none of the plaintiffs are citizens or residents of the State of Kentucky, and that the defendant is a Kentucky corporation and a

citizen and resident of that State; that the plaintiffs, William D. Stein, Frank G. Hall and Gerda Stein, were partners doing business as Stein Hall & Company, and that they assigned the contract on which this suit is based and the cause of action to the plaintiff, Stein Hall Manufacturing Company.

The petition further alleges in substance that on October 9, 1918, the plaintiff partnership sold to the defendant 80,000 pounds of Badex, a food stuff, at a price of 7¼ cents per pound net f. o. b. Chicago, to be shipped to Louisville, Kentucky, within sixty days or on or about December 9, 1918; that on December 9, 1918, the plaintiff partnership shipped 80,000 pounds of said Badex to the defendant at Louisville, Kentucky; that the defendant refused to accept said Badex or to pay for the same or to take charge of same.

The petition further alleges that:

> "Said plaintiff, Stein Hall & Company, by telephone, personal interview, solicitation and investigation, made every effort possible or known to them for a great number of months after said refusal to accept said Badex by said defendant, to sell same on the open market or to private purchasers or to any one who would take it, but were absolutely unable to get any bid whatever from any one for said Badex, and they aver that from the time of said refusal of said defendant to accept said delivery, as hereinbefore set out, and for a long time subsequent thereto, at the place of delivery of said Badex under said contract, the same was of no value upon the open market or elsewhere, or in Chicago, or elsewhere,

and there was no fair or reasonable or market or any price for same.

"Plaintiffs say that said Badex, on or about December 12, 1918, and for some time subsequent thereto at the place of delivery of said Badex under said contract, was of no value upon the open market f. o. b. Chicago, or elsewhere, and there was no fair or reasonable or market or any price for same."

The petition further alleges that the plaintiffs were thereby damaged in the sum of $5,800.00 with interest.

Upon order of court entered on motion of the defendant to make the petition more specific, the plaintiffs filed an amendment to their petition which shows that on November 8, 1919, eleven months after the date of the breach of the contract by the defendant, the plaintiff corporation sold the 80,000 pounds of Badex to Ruehlmann Flour Company at Cincinnati, Ohio, for the sum of $4,521.95.

The amendment to the petition further states:

"Plaintiffs further state that they do not elect to sell and have never elected to sell and did not in fact sell said Badex as agent or for the account of the defendants herein, but when said defendant refused to take said Badex, as set out in the original petition herein, said plaintiffs took possession of said Badex as their own and sold the same in November, 1918, as heretofore set out, as their own."

The defendant filed a demurrer to plaintiffs' petition as amended, setting forth that said petition showed that the amount in controversy, exclusive of

interest and costs, did not exceed the sum or value of $3,000.00, and that therefore the court had no jurisdiction of the case.

Defendant's demurrer was sustained and plaintiffs' petition dismissed for want of jurisdiction on the sole ground, as the court says in its opinion, "that the plaintiff cannot upon the facts stated, recover as much as $3,000.00."

This cause now appears before this court on writ of error.

ERRORS RELIED ON.

The plaintiffs-in-error assign as error the ruling of the trial court: First, in sustaining the demurrer of the defendant; second, in dismissing plaintiffs' suit; and third, in adjudging that it was without jurisdiction or power to entertain this suit.

BRIEF OF ARGUMENT.

I.

Where a buyer refuses to accept and pay for goods sold it, the universal rule of law is that the seller is entitled to sue for breach of the contract and recover damages equal to the difference between the contract price and the market price or value at the time and place of delivery.

Benjamin on "Sales," (6th Ed.), p. 929.
2 Williston on "Sales," (2d Ed.), p. 1434.
Tiffany on "Sales," (2d Ed.), p. 349.

II.

Where the goods have no market or other value at the time when the contract should have been performed, the unpaid seller is entitled to damages equal to the entire contract price.

Tiffany on "Sales," (2d Ed.), p. 349.
2 Williston on "Sales," (2d Ed.), Sec. 582.
Allen v. *Jarvis,* 20 Conn. 38, 48.
Belisle v. *Berkshire Ice Co.,* 98 Conn. 689.
Field v. *United States,* 16 Ct. of Cl. 434, 446.
Barry v. *Cavanagh,* 127 Mass. 394.
Wells v. *Maley,* 5 Ky. L. Rep. 862.
Flannery v. *Wessels,* 244 Pa. St. 321.

III.

The fact that the seller, after a breach of the contract by the buyer in refusing to accept and pay for goods purchased, thereafter sells such goods and obtains an increased price over and above the market price or value at the date of the breach, does not change the measure of the seller's damages.

Bridgford v. *Crochker,* 60 N. Y. 627.
Sour Lake Townsite Co. v. *Deutser Furniture Co.,* 39 Tex. Civ. App. 86.
Gray v. *Central R. R. Co.,* 31 N. Y. S. 704.

ARGUMENT.

I.

Where a buyer refuses to accept and pay for goods sold it, the universal rule of law is that the seller is entitled to sue for breach of the contract and recover damages equal to the difference between the contract price and the market price or value at the time and place of delivery.

The above proposition of law is so well settled that we shall content ourselves with citing three leading textbooks on the subject of sales, to wit:

Benjamin on "Sales," 6th Ed., p. 229.
2 Williston on "Sales," 2nd Ed., p. 1434.
Tiffany on "Sales," 2nd Ed., p. 349.

In the instant case, the contract price was 7¼ cents per pound f. o. b. Chicago for 80,000 pounds, or $5,800.00. The plaintiffs after the date of the breach and for a reasonable time thereafter, made every possible effort to sell said Badex, but were unable to sell it for any price and the Badex was absolutely of no value at the time of the breach and for a reasonable time thereafter. Plaintiffs' damages therefor, under the above authorities, were the difference between the contract price and the value of the worthless Badex at the time the contract should have been performed, namely, $5,800.00.

It would have been a good and sufficient averment had plaintiffs alleged in their petition that the fair

and reasonable market price of Badex on December 8, 1918, and for a reasonable time thereafter, was nothing, and that during said period the Badex was of no value whatever. Plaintiff, however, adopted a somewhat more elaborate method of averment and set forth specific facts to show that on December 8, 1918, and for a reasonable time thereafter there was no fair and reasonable market price for Badex and that Badex was of no value whatsoever. The purpose of these averments was solely to show that there was no fair and reasonable market price and no value on December 8, 1918, and for a reasonable time thereafter; the price at which goods are sold is evidence of the market price or value and the fact that goods cannot be sold at all is evidence of the lack of a market price or value. The averments were not made, and it cannot be legitimately inferred that they were made, to show that the plaintiffs were endeavoring to sell the goods as agent of the defendant or for the purpose of fixing the damages as the difference between the contract price and a re-sale price. That the plaintiffs did not attempt to sell this Badex for the use or benefit of defendant or as defendant's agent is clearly shown by the allegation:

> "that they do not elect to sell and have never elected to sell and did not in fact sell said Badex as agent or for the account of the defendants herein, but when said defendant refused to take said Badex, as set out in the original petition herein, said plaintiffs took possession of said Badex as their own."

II.

Where the goods have no market or other value at the time when the contract should have been performed, the unpaid seller is entitled to damages equal to the entire contract price.

The above rule as laid down by the cases is, in reality, but a corollary of the universal rule of law that an unpaid seller may recover as damages the difference between the contract price and the market price as of the date when the contract should have been performed. As we have pointed out above, the difference between the contract price and the market price or value, where the latter is nothing, is necessarily the contract price. The authorities on this proposition are uniform.

In

Tiffany on "Sales," 2nd Ed., p. 349,

the writer, in discussing the proper measure of the seller's damages in a suit for a breach of contract, where the buyer refused to accept and pay for the goods sold, says:

> "If the goods have no money value, the damages will be equal to the whole contract price."

In

2 Williston on "Sales," 2nd Ed., Sec. 582,

the author, in discussing this question, says that under such circumstances

"the damages are the entire contract price without deduction."

There are many cases in point. We shall not burden the court with quoting from the numerous cases directly in support of this proposition, but invite its attention to

Allen v. *Jarvis,* 20 Conn. 38, 48.
Belisle v. *Berkshire Ice Co.,* 98 Conn. 689.
Barry v. *Cavanagh,* 127 Mass. 394.
Field v. *United States,* 16 Ct. of Cl. 434, 446.
Wells v. *Maley,* 5 Ky. L. Rep. 862.
Flannery v. *Wessels,* 244 Pa. St. 321.

As we have pointed out, the petition clearly shows that the contract price of the Badex was $5,800.00, and the market price and actual value thereof at the time when the contract should have been performed was nothing. Under all of the above authorities, the plaintiffs are entitled to recover the difference between the contract price and the market price or value of nothing, or, to put it in another way, the plaintiffs are entitled to damages equal to the contract price. Such damages amount to $5,800.00.

III.

The fact that the seller, after a breach of the contract by the buyer, in refusing to accept and pay for goods purchased, thereafter sells such goods and obtains an increased price over and above the market price or value at the date of the breach, does not change the measure of the seller's damages.

The plaintiffs were required by order of court to amend their petition and to show what was done with the car of Badex after the breach of the contract by the defendant. Plaintiffs were further required to show the date of sale of their car, if any, and the price at which the car was sold. Conforming to the order of court, the plaintiffs alleged in an amendment to their petition that eleven months after the breach, or in November, 1919, the plaintiff sold this particular car of Badex for $4,521.95. The lower court held that under such facts the plaintiffs were entitled to recover only the difference between the contract price of $5,800.00 and this $4,521.95, and that therefore since the amount of their damages was less than $3,000.00, the Federal Court had no jurisdiction of the case.

Had the defendant carried out its contract, the plaintiff would have received from the defendant on or about December 9, 1918, $5,800.00 for the 80,000 pounds of Badex. On that date and for a long time thereafter, according to the petition, Badex was valueless. Since the defendant would not carry out

its contract, the plaintiff on December 9th was the loser of exactly $5,800.00 and had 80,000 pounds of Badex on its hands which was without any value whatever. The time of performance was December 9, 1918; the breach of the contract took place on that date, and under all rules of damages, as we have shown, plaintiff is entitled to recover damages for breach of the account as of the date of the breach. The damages having been fixed and determined as of the date of the breach, those damages are not affected by the fact that almost a year later the goods acquired a market value, and as we shall hereafter show, the fact of the re-sale of the goods almost a year later for some $4,000.00 is not material or pertinent to the case at bar and should not have been considered by the trial court.

Upon the repudiation of the contract by the defendant and the election of plaintiffs to treat the goods as their own and hold the defendant for the difference between the contract price and the market price or value of the date of the breach, the defendant had no further interest in this particular car of Badex. It belonged to the plaintiff and what was thereafter done with it was no concern of the defendant. It follows that the sale of this particular car by the plaintiffs in November, 1919, is of no more moment to the rights between the plaintiffs and the defendant than the sale of any other car would be. It is true that the sale of this car in November, 1919, for $4,500.00 or the sale of any other car at that time would

be evidence of a market price of a car of Badex, but it would be evidence of a market in November, 1919, and *no* evidence that there was a market or a value some eleven months before when the damages were fixed and determined.

That this must be true is proved by the logic of the situation. The damages must be fixed as of the date of the breach and not by what occurs thereafter. For illustration, suppose the goods here had a market value of $2,800.00 upon the date of the breach so that plaintiffs' damages would have been $3,000.00. But suppose further that the plaintiffs had held the goods after defendant's breach, for some two years, looking for a favorable market, and at the end of two years had sold the goods for $5,800.00 (the contract price) or more. Upon the principle contended for by the defendant and upon which the trial court dismissed the plaintiffs' petition, the defendant in the supposititious case would contend that it was not liable for any damages at all. But suppose that instead of keeping the goods for two years and then selling them for $5,800.00, the plaintiffs in the supposititious case, finding that the market was going down, had sold the goods one month or two months or even two years after the date of the breach for $1,000. The difference between the contract price and $1,000.00 is $4,800.00 and not $3,000.00. The defendant would contend, however, in such a case, that the damages were fixed upon the date of the breach and that it was liable for $3,000.00 and not for $4,800.00. But certainly the

law will not give the purchaser who breaks his contract the privilege of profiting by a rise in the market and the seller's astuteness in selling at the high market and losing nothing by a fall in the market after the date of his breach. If it did, then whatever occurred after the date of the breach could not be to the disadvantage of the defaulting party, but only to its advantage. It is apparent that such a rule of law would result in injustice and confusion, but unless the law gives the defaulting purchaser such privileges and advantages the principle contended for by the defendant in the case at bar must necessarily be erroneous and the application of that principle by the trial court was error.

That the position of the plaintiffs is sound and that the trial court was in error in assuming that the sale some eleven months after the date of the breach was material in determining the amount of plaintiffs' damages is shown by the authorities. In the case of

Bridgford v. *Crocker,* 60 N. Y. 627,

the plaintiff contracted to sell the defendant 500 head of cattle. The defendant refused to accept 126 head thereof, and the plaintiff sued for breach of contract and recovered as damages the difference between the contract price and the market value at the time the defendant should have received and paid for the cattle. The facts, however, showed that the plaintiff held the cattle for some months after the defendant refused to accept them and then sold such cattle at

an increased price. The defendant claimed the benefit of the sale. The court held:

> "Plaintiff had the election either to tender the cattle and recover the contract price, or to keep the cattle as his own, and recover his damages, to be determined in accordance with the rulings of the court (Dustin v. Andrews, 10 Bosw. 130, questioned); and that it mattered not, and could not be taken into consideration what plaintiff received upon a subsequent sale of the cattle; if the cattle rose in the market, after the failure to perform, the plaintiff, not the defendants, was entitled to the benefit of the enhanced value."

This case is directly in point. The plaintiffs in the case at bar, as in the Bridgford case, were entitled to damages based on the difference between the contract price of $5,800.00 and the market price of nothing, and in the words of the Bridgford case "it mattered not and could not be taken into consideration what plaintiff received upon a subsequent sale" of the car of Badex.

In the case of

> *Sour Lake Townsite Co.* v. *Deutser Furniture Co.*, 39 Tex. Civ. App. 86.

the plaintiff furniture dealer contracted to sell certain furniture to the defendant, who later refused to receive the goods. The plaintiff kept its goods as its own and disposed of them sometime after the breach of contract at a price higher than the market price upon the day of the breach. The defendant contended

that it was entitled to credit for this increase, represented by the difference between the resale price and the market price at the time of the breach, but the court said, page 189:

> "Suppose the seller elects to keep the goods, and afterwards sells the same for the market value then, but for much less than would have been the market value at the time and place of delivery, certainly it would not be contended that in such case the defaulting purchaser could be made to stand the loss by reason of the sale for less than such market value. Having elected which one of the three remedies open to him he will pursue the seller is bound by the measure of damages appropriate thereto, nor can he be held to any other measure by the purchaser. The right of the seller to resell, in satisfaction of the unpaid purchase money, is well settled; but he is not required to do so. 24 Am. & Eng. Ency. of Law, p. 1140. Nor, if he elects to retain the goods, is he bound either to keep them always or, as an alternative, account to the defaulting purchaser for whatever he may realize upon a sale of them in the future. It does not appear when the articles claimed to have been sold by appellee were, in fact, sold, but it does appear that they were sent to Beaumont and mingled with its general stock, and thus disposed of at some time after the breach of the contract, having been kept, in the meantime, at the risk of appellee both as to loss in value and in other ways. It was immaterial at what price these articles were sold by appellee, and there was no error in sustaining appellee's objection to the evidence offered on this point. Nor did the court err in fixing the measure of damages at the difference between the contract price and the market value at the time and place of delivery."

In the case of

Gray v. *Central Railroad Co.*, 31 N. Y. S. 704,

the substance of the decision is shown by the syllabus which reads:

> "In an action for damages for failure of defendant to take and pay for property sold to him the measure of damages is the difference between the contract price and the actual value of the property at the time of the refusal, and it is error to charge that the measure of damages was the difference between the contract price and the price for which plaintiff afterwards sold the property."

In view of the above authorities and the logic and principle of the rule of law applicable to the parties here, counsel for plaintiff respectfully contend that the plaintiffs under their petition were entitled to recover the difference between the contract price and the market price at the time and place of delivery, to wit: on or about December 8, 1918; that since the contract price was $5,800.00 and the market price or value of the goods was at said time nothing, plaintiffs' damages were $5,800.00; that the fact that the plaintiffs sold this car of Badex eleven months later when the market had again risen is immaterial and has no effect whatever on the measure of plaintiffs' damages; that plaintiffs' damages were in excess of Three Thousand Dollars ($3,000) and that therefore the trial court had jurisdiction to hear and determine this case.

We respectfully submit that the lower court erred in sustaining defendant's demurrer to plaintiffs' petition and dismissing said cause for want of jurisdiction; that the judgment of the District Court be reversed and the cause remanded with directions to the District Court to overrule defendant's demurrer and with such further directions as to this court shall seem meet.

CHARLES CARROLL,
SIGMUND W. DAVID,
W. S. HEFFERAN, JR.,
RICHARD PRIEST DIETZMAN,
Attorneys for Plaintiffs-in-Error.

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Office Supreme Court, U. S.
FILED
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WM. R. STANSBURY
CLERK

No. 177

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1924.

WILLIAM D. STEIN, FRANK G. HALL and GERDA STEIN, partners doing business under the firm name of STEIN, HALL & COMPANY, and STEIN HALL MANUFACTURING COMPANY,

Plaintiffs in Error,

vs.

TIP TOP BAKING COMPANY,

Defendant in Error.

In error to the District Court of the United States for the Western District of Kentucky.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

CHARLES CARROLL,
SIGMUND W. DAVID,
W. S. HEFFERAN, Jr.,
RICHARD PRIEST DIETZMAN,
ATTORNEYS FOR PLAINTIFFS IN ERROR

HAWKINS & LOOMIS CO., LAW PRINTERS, CHICAGO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1924.

WILLIAM D. STEIN, FRANK G. HALL and GERDA STEIN, partners doing business under the firm name of STEIN, HALL & COMPANY, and STEIN HALL MANUFACTURING COMPANY, *Plaintiffs in Error,* *vs.* **TIP TOP BAKING COMPANY,** *Defendant in Error.*	In error to the District Court of the United States for the Western District of Kentucky.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

We believe that it will be of assistance to the Court to indicate briefly the error in the reasoning of defendant in error.

We have no criticism to make of the quotation from

35 Cyc. 591,

found at the bottom of page 3 of defendant in error's brief. The measure of plaintiffs in error's damages is, of course, "the actual injury sustained by" plaintiff in error. But the time to determine and fix such injury is *the time of the breach*, the time when the seller tried to deliver under the terms of the contract, and the buyer refused to accept, *not eleven months later*. We have shown this clearly on pages 10 to 13 of our brief and by the authorities cited on page 6 thereof, and we shall not repeat the argument.

On pages 8 and 9 of its brief, plaintiffs in error cited eight authorities holding that "where the goods have no market or other value at the time when the contract should have been performed, the unpaid seller is entitled to damages equal to the entire contract price," and on pages 13 to 16 cited three cases to the effect that a re-sale by the seller at an increased price over and above the market price or value at the date of the breach did not change the measure of the seller's damages. Without commenting upon or even referring to these authorities, defendant in error cites the single case of

Louis P. Hyman Company v. *H. H. Snyder Company,* 159 Ky. 354,

in support of its proposition that where there is no market price, the measure of damages is the difference between the contract price and the price at which the seller is compelled to sell.

That case, however, does not support defendant in error's proposition. A cursory reading of that case will show that the question now before this court was not there involved. In that case, while the date of resale does not definitely appear, it can be readily and fairly inferred that the goods were resold almost immediately after the breach by the buyer, and were probably resold for the buyer's use. Under such circumstances, of course, the seller is entitled to recover the difference between the contract price and the price at which the goods were resold. In the case at bar, however, the goods were not resold immediately, or within a short time, by the plaintiff seller for the defendant buyer's use or benefit, but were in fact *resold eleven months later as the plaintiff's goods.* And in the *Hyman case* the right of the seller to recover the difference between the contract price and the price of resale was not even raised. No issue was made on that proposition.

The only question of damages which the Court was called upon to determine was whether the seller in its counterclaim had the right to recover the cost of handling and removing the unaccepted goods after the breach by the buyer in addition to the difference between the contract price and the resale price. The right to recover the difference between the contract price and resale price was not disputed.

Respectfully submitted,

CHARLES CARROLL,
SIGMUND W. DAVID,
W. S. HEFFERAN JR.,
RICHARD PRIEST DIETZMAN,
Attorneys for Plaintiffs in Error.

Office Supreme Court, U. S.
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 177.

WILLIAM D. STEIN, FRANK G. HALL and GERDA STEIN, Partners Doing Business Under the Firm Name of Stein, Hall & Company and Stein Hall Manufacturing Company, - - Plaintiffs-in-Error,

vs.

TIP TOP BAKING COMPANY, - Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

GEORGE DU RELLE,
ALLEN P. DODD,
Attorneys for Defendant-in-Error.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 177.

WILLIAM D. STEIN, FRANK G. HALL AND GERDA STEIN, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF STEIN, HALL & COMPANY AND STEIN HALL MANUFACTURING COMPANY, - - - - *Plaintiffs-in-Error,*

vs.

TIP TOP BAKING COMPANY, - *Defendant-in-Error.*

POINTS AND AUTHORITIES.

1.

The measure of damages for a breach by the buyer of the contract of sale is the actual injury sustained by the seller by reason thereof, including whatever damages was the natural and probable result of the breach, or may fairly be held to have been within the contemplation of the parties.....page 3

Cyc., Volume 35, page 591.

2.

In case of ordinary sales, the measure of damages for a breach by the buyer is the difference between the contract price and the market price at the time of the breach, if the article has a market price, *but if it has no market price, the measure of damages is the difference between the contract price and the price at which the seller is compelled to sell*.....page 4

Louis P. Hyman Company v. H. H. Snyder Company, 159 Kentucky, 354.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 177.

WILLIAM D. STEIN, FRANK G. HALL AND GERDA STEIN, PARTNERS DOING BUSINESS UNDER THE FIRM NAME OF STEIN, HALL & COMPANY AND STEIN HALL MANUFACTURING COMPANY, - - - - - *Plaintiffs-in-Error,*

vs.

TIP TOP BAKING COMPANY, - *Defendant-in-Error.*

BRIEF FOR DEFENDANT-IN-ERROR.

STATEMENT.

This suit arises out of a contract between the plaintiff-in-error and the defendant-in-error entered into on or about October 9, 1918, for the sale of a carload of flour substitute known as Badex, amounting to 80,000 pounds at a price of 7¼ cents f. o. b. Chicago, Illinois. The shipment was made to the defendant-in-error on December 9, 1918, and was refused on or about that date by the defendant-in-error. Suit was filed in October, 1919, and in the petition the plaintiffs in the court below sought recovery for the whole contract price of the carload of Badex, or $5,800.00.

The defendants in the court below interposed a motion to require the plaintiffs to make their petition more definite, certain and specific, and to state what became of the product that was shipped, and the lower court having sustained the motion, in compliance with the orders of court, an amended petition was filed showing that in November, 1919, the carload of Badex was sold for $4,521.95. The carriage charges on the property that was shipped were as follows:

Freight from Louisville to Cincinnati where it was sold	$103.62
Demurrage	18.54
Switching charges	4.64
Warehouse charges	281.60
Unloading charges	20.00
Drayage	78.05
Brokerage	115.00
Total carriage charges	$621.45

If the defendant-in-error is charged with the carriage charges on this carload of Badex amounting to $621.45 above set forth, and credited with the $4,521.95, the amount received for this property, it will leave a balance due the plaintiff-in-error of $1,899.50. On the theory that this amount was the largest amount the plaintiffs could recover in the court below, together with interest thereon and the cost of the action, the trial court sustained a demurrer to the petition for want of jurisdiction. From the judgment of the trial court, dismissing the petition solely on this ground, this writ of error is prosecuted.

ARGUMENT.

The only contention made in this court by counsel for plaintiffs-in-error upon which they base their right for a reversal is that the trial court applied an improper measure of damages in determining that there was not as much as $3,000.00 involved in the controversy.

That the plaintiffs-in-error sold the property and actually obtained $4,521.95 in less than a year after the shipment was made, and in less than a month after they filed their petition is conceded. That the payment to the plaintiffs of $1,899.50, together with interest thereon from the date of the shipment, and the cost of the proceedings, would make the plaintiff whole and restore to the plaintiff all of the losses it claims to have sustained cannot be successfully denied. If the measure of damages applied by the trial court to the pleadings as they stood was proper, then it must necessarily follow that this case should be affirmed.

In Cyc., Volume 35, page 591, the general rule as to the measure of damages is laid down in the following language:

> "The measure of damages for a breach by the buyer of the contract of sale, is the actual injury sustained by the seller by reason thereof, including whatever damages was the natural and probable result of the breach, or may fairly be held to have been within the contemplation of the parties."

The Kentucky Court of Appeals has passed upon this matter in a case very similar, if not on all fours, with the case at bar. In Louis P. Hyman Company v. H. H. Snyder Company, 159 Ky. 354, that court among other things said:

> "In case of ordinary sales, the measure of damages for a breach by the buyer is the difference between the contract price and the market price at the time of the breach, if the article has a market price, but if it has no market price the measure of damages is the difference between the contract price and the price at which the seller is compelled to sell."

Applying the rule announced in the Hyman case, *supra,* to the facts alleged in the petition and petition as amended, it will be seen that the correct measure of damages to the plaintiffs-in-error is the difference between the contract price of $5,800.00 and the price at which it was compelled to sell, or $4,521.95, plus the carriage charges, and at the very highest this could not amount to, as set forth above, more than $1,899.50. The only thing the trial court could do was to sustain the demurrer on the ground that there was not as much as $3,000.00 involved in the proceeding. We respectfully submit that for the foregoing reasons this case should be affirmed.

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